No. 92-81

Supreme Court, U.S.
FILED
SEP 29 1992
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In the Supreme Court of the United States

OCTOBER TERM, 1992

STEPHEN B. ELLIS, PETITIONER

v.

ANDREW H. CARD, JR.,
SECRETARY OF TRANSPORTATION, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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16 pp

QUESTION PRESENTED

The Surface Transportation Assistance Act of 1982, Pub. L. No. 97-424, § 105(f), 96 Stat. 2100 (1983), and the Surface Transportation and Uniform Relocation Assistance Act of 1987, Pub. L. No. 100-17, § 106(c), 101 Stat. 145-146 (1987), together with their implementing regulations, required States receiving federal highway funds to allocate a portion of those funds to disadvantaged-business enterprises (DBEs), including primarily minority- and women-owned businesses. The question presented is whether the State of Utah's implementation of that federally mandated DBE program violated the Equal Protection Clause.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 25-35) is reported at 961 F.2d 912. The opinion and judgment of the district court (Pet. App. 1-24) are reported at 753 F. Supp. 329.

JURISDICTION

The judgment of the court of appeals was entered on April 10, 1992. The petition for a writ of certiorari was filed on July 9, 1992. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. a. In 1983, Congress enacted the Surface Transportation Assistance Act of 1982 (STAA), Pub. L. No. 97-424, 96 Stat. 2097 (1983), which authorized federal funds for interstate highway construction projects. Section 105(f) of that Act provided that "[e]xcept to the extent that the Secretary determines otherwise, not less than 10 per centum of the amounts authorized to be appropriated under this Act shall be expended with small business concerns owned and controlled by socially and economically disadvantaged individuals." 96 Stat. 2100.[1] Under the STAA, the term "socially and economically disadvantaged individuals" presumptively included Black Americans, Hispanic Americans, Native Americans, Asian-Pacific Americans, or Asian-Indian Americans. 48 Fed. Reg. 33,442 (1983).

The STAA expired after four years, and in 1987 Congress enacted the Surface Transportation and Uniform Relocation Assistance Act of 1987 (STURAA), Pub. L. No. 100-17, 101 Stat. 132 (1987). Section 106(c) of the STURAA established a ten-percent disadvantaged-business enterprise (DBE) program similar to that previously established in the STAA. 101 Stat. 145-146.[2]

Under the United States Department of Transportation (DOT) regulations applicable to STURAA, a

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[1] Section 105(f) was modeled after Section 103 of the Public Works Employment Act of 1977, Pub. L. No. 95-28, 91 Stat. 116-117 (1977), which created a minority business enterprise (MBE) program at the Department of Commerce. See *Fullilove* v. *Klutznick*, 448 U.S. 448, 453-454 (1980). This Court upheld the facial constitutionality of the MBE provision of the Public Works Employment Act in *Fullilove* v. *Klutznick*.

[2] The STURAA expired in 1991, and that year Congress enacted the Intermodal Surface Transportation Efficiency Act of 1991, Pub. L. No. 102-240, 105 Stat. 1914 (1991), which contains a similar ten-percent DBE goal. § 1003(b), 105 Stat. 1919-1921.

"disadvantaged business" is defined as a small business concern at least 51% owned and managed by "socially and economically disadvantaged individuals." 49 C.F.R. 23.62. The regulations define "socially and economically disadvantaged individuals" by establishing a rebuttable presumption that such individuals include women, Black Americans, Hispanic Americans, Native Americans, Asian-Pacific Americans, and Asian-Indian Americans, or any other minorities or individuals found to be disadvantaged by the Small Business Administration. *Ibid.*

The regulations provide that, in appropriate circumstances, non-minority firms that are owned by socially and economically disadvantaged individuals may be included in the set-aside program as well. See 49 C.F.R. 23.62 ("Recipients [of federal funds] * * * may determine, on a case-by-case basis, that individuals who are not [members of the designated groups] are socially and economically disadvantaged."); see also 49 C.F.R. Pt. 23, Subpt. D, App. C. Likewise, the regulations provide that minority-owned firms may be denied preferential treatment under certain circumstances. 49 C.F.R. 23.69. Each recipient of federal highway funds is required to establish a "challenge procedure" permitting third parties to challenge an individual's entitlement to disadvantaged status. 49 C.F.R. 23.69(a). Businesses that are owned by persons presumed to be disadvantaged may lose their presumptive DBE status if it is determined that the owners are not in fact socially and economically disadvantaged. *Ibid.*

b. The DOT regulations require States receiving federal highway funds to set annual goals for the use of DBEs in federally assisted highway construction projects. 49 C.F.R. 23.64. The STAA and the STURAA each established a nationwide goal of ten-percent participation by DBEs, but the regulations permit States to deviate upward or downward from the ten-percent annual

goal in certain circumstances. 49 C.F.R. 23.64(d) and (e). In setting its annual goal, a State must consider the number and types of contracts to be awarded, the number of DBEs available to compete for those contracts, and the results of past efforts to contract with DBEs. 49 C.F.R. 23.45(g)(5); see also 49 C.F.R. 23.45(g)(1).

A State seeking approval of an annual goal of less than ten percent must submit a "justification" setting forth specific information, including efforts taken to locate DBEs and to make such businesses aware of contracting opportunities. 49 C.F.R. 23.65. Federal officials may approve the lower goal if they find that the recipient is making "all appropriate efforts" to increase DBE participation to the ten-percent level, and the lower goal represents a reasonable expectation for DBE participation given the availability of DBEs presently eligible to work on federally assisted projects. 49 C.F.R. 23.66(b); see also 49 C.F.R. Pt. 23, Subpt. D, App. D ("Justification for Requests for Approval of Overall Goals of Less Than Ten Percent."). If a State is unable to meet its goal using DBEs from the same geographic area in which it generally seeks contractors or subcontractors, it must expand its search to a "reasonabl[y] wider geographic area." 49 C.F.R. 23.45(g)(8).[3]

c. The State of Utah elected to receive federal highway funds under STAA and STURAA, and accordingly the State became a participant in the federal DBE program. Utah's DBE plan "mirrors the federal statutory and regulatory structure in every significant respect." Pet. App. 28. Utah's plan established a ten-percent annual goal, and the State has never sought approval for an

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[3] The regulations also require States to establish DBE-participation goals for each individual prime contract. 49 C.F.R. 23.45(g)(2)(ii) and (7). Petitioner does not challenge that aspect of the federal DBE program.

annual goal of less than ten percent. *Id.* at 32 & n.4. The parties stipulated that Utah has never made any findings of past discrimination against DBEs in Utah's public construction industry, and that in 1984 minorities made up approximately 7.6% of the State's total population. C.A. App. 245-246. According to petitioner, less than two percent of the firms available for subcontract work in Utah are DBEs. Pet. 6.

2. Petitioner is a white male landscape subcontractor. Pet. App. 2. In 1986, petitioner submitted a quote of $13,250 for landscaping work on a federally assisted highway project sponsored by the Utah Department of Transportation (UDOT). That project was subject to the ten-percent DBE goal, and the subcontract was awarded to Milsap Landscaping, a DBE, which had submitted a quote of $18,750 for the same work. *Id.* at 5; C.A. App. 247. Similarly, in 1988, petitioner submitted a quote of $131,204 for landscaping work on another UDOT project. That project also was subject to the ten-percent DBE goal and the landscaping subcontract was therefore awarded to Gallegos & Shelton, a DBE, which had submitted a quote of $134,286. Pet. App. 5; C.A. App. 247.

3. In July 1987, petitioner filed an action for declaratory and injunctive relief against officials of the United States Department of Transportation and the Utah Department of Transportation (UDOT), alleging that the federal DBE program as applied by Utah violated the Equal Protection Clause of the Fourteenth Amendment. Pet. App. 27-28. Subsequently, the parties filed cross-motions for summary judgment, including a joint stipulation of facts. Petitioner stipulated that the federal statutes and implementing regulations are facially lawful and constitutional. *Id.* at 28.

In October 1990, the district court issued its decision granting the defendants' motion for summary judgment and denying petitioner's motion for summary judgment.

Pet. App. 1-22. The court rejected petitioner's argument that the case was governed by *City of Richmond* v. *J.A. Croson Co.*, 488 U.S. 469 (1989), and thus that the State had to make specific findings of discrimination to implement the federal program. Pet. App. 11-16. The court concluded that the case was properly analyzed under *Fullilove* v. *Klutznick*, 448 U.S. 448 (1980), which involved a challenge to a similar federal program, and not *Croson*, which involved a program enacted by a city. Pet. App. 16. The court explained that "[t]his case would be properly analyzed under *Croson* if the State of Utah had enacted a DBE program based on its own initiative. However, the only reason the State has its DBE program is because Congress required it to have such a program as a condition for the State to receive federal highway funds." *Id.* at 13. The court added that "there is nothing in *Fullilove* to suggest that states which elect to participate in the program by accepting federal funds are thereby obligated to make findings of past discrimination in addition to the determination already made by Congress and the President." *Id.* at 14.

The district court also held that Utah's adherence to a ten-percent DBE goal did not render the program unconstitutional as applied, despite the State's low minority population. Pet. App. 16-20. The court noted that there was no evidence that Utah was unable to meet its ten-percent goal, and thus the State would not have been entitled to obtain a waiver of the ten-percent requirement under the applicable DOT regulations. *Id.* at 17-20. Moreover, petitioner had stipulated that those regulations were facially valid. *Id.* at 17. Accordingly, the court concluded that the State was under no obligation to seek a waiver. *Id.* at 19.

4. The court of appeals affirmed. Pet. App. 25-35. Noting that petitioner had conceded the facial validity of the applicable federal statutes and regulations, the court

concluded that petitioner claimed only "that Utah's implementation of the federal plan—specifically Utah's failure to seek a waiver from the ten-percent annual goal [—] is unconstitutional" under this Court's *Croson* decision. *Id.* at 32. In the court's view, the dispositive question in determining whether *Croson* applied in this context was whether the State's failure to seek a waiver was the equivalent of a local government's decision to enact its own racial set-aside program. *Ibid.*

In analyzing that question, the court of appeals first noted that the applicable DOT regulations permit issuance of waivers only where a State is unable to attain the ten-percent goal. Pet. App. 32-33. Utah has consistently achieved that goal, and thus would not be entitled to a waiver under the terms of the regulations. *Id.* at 34. Thus, Utah's "fail[ure]" to obtain a waiver was merely the result of the DOT regulations that petitioner had stipulated to be facially valid. *Id.* at 34-35. Relying on *Milwaukee County Pavers Ass'n* v. *Fiedler*, 922 F.2d 419 (7th Cir.), cert. denied, 111 S. Ct. 2261 (1991), and *Tennessee Asphalt Co.* v. *Farris*, 942 F.2d 969 (6th Cir. 1991), the court reasoned that the State's decision to comply with federal law could not give rise to a violation of the Fourteenth Amendment. Accordingly, the court of appeals concluded that "the *Croson* decision does not apply to this appeal, and the State of Utah is not required to make factual findings to justify its inability to seek a waiver of the ten-percent set-aside goal." Pet. App. 35.

ARGUMENT

This case does not involve a challenge to the constitutionality of the federal DBE program as a whole; petitioner has stipulated that the federal statutes and regulations are lawful and constitutional on their face. Pet. App. 32. Petitioner also acknowledges that Utah implemented the federal statutes and regulations in accor-

dance with their terms. Pet. 6. Nevertheless, petitioner argues that Utah's adherence to the facially valid provisions of the federal program was unlawful.[4] There is no conflict among the circuits on that question, however, nor is the decision below inconsistent with any decision of this Court. Accordingly, further review is not warranted.

1. Petitioner contends (Pet. 7-18) that the court of appeals erred in concluding that this case is governed by *Fullilove* v. *Klutznick*, 448 U.S. 448 (1980). Instead, petitioner argues, the State of Utah was not permitted to implement the DBE program created by STAA and STURAA until the State had satisfied the stricter standards applicable to state-sponsored racial set-aside programs as set forth in *City of Richmond* v. *J.A. Croson Co.*, 488 U.S. 469 (1989). As petitioner concedes, however, the question whether *Croson* or *Fullilove* applies to a State's implementation of a federally mandated DBE program is one "of first impression" in this Court. Pet. 7, 15. Moreover, the court of appeals' decision on this issue is in accord with the decisions of both other courts of appeals that have addressed this question.[5]

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[4] Petitioner also asserts (Pet. 8 n.3) that "[t]he UDOT program is strictly a race-based program since the only basis for qualifying as a so-called 'DBE' is race." That assertion is incorrect. Under STURAA, women-owned business enterprises (WBEs) were presumptively entitled to DBE treatment. 49 C.F.R. 23.62. Similarly, under STAA, separate percentage goals were set for WBEs. See 45 Fed. Reg. 21,187 (1980) (codified at 49 C.F.R. 23.45(g)(4)); see also C.A. App. 247 (noting separate one-percent WBE goal). Moreover, under both STURAA and STAA, individuals who were not members of groups presumptively entitled to preferential treatment could nonetheless qualify for DBE status on a case-by-case basis. 49 C.F.R. 23.62; 48 Fed. Reg. 33,442 (1983).

[5] The same issue is currently pending before the Second Circuit in *Harrison & Burrowes Bridge Constructors, Inc.* v. *Cuomo*, No. 91-9090, and *United Fence & Guard Rail Corp.* v. *Cuomo*, No. 91-

In *Milwaukee County Pavers Ass'n* v. *Fiedler*, 922 F.2d 419, cert. denied, 111 S. Ct. 2261 (1991), the Seventh Circuit addressed a similar challenge to Wisconsin's implementation of the STURAA program. In that case, plaintiffs conceded the validity of the federal statute and regulations both on their face and as applied. 922 F.2d at 423. In view of that concession, the court of appeals rejected plaintiffs' arguments that Wisconsin was required to make its own findings of prior discrimination or seek a waiver of the ten-percent goal before implementing the set-aside program. The court stated:

> These arguments * * * are inconsistent with the contractors' decision not to challenge the validity of the federal or statute or regulations. Insofar as the state is merely complying with federal law it is acting as the agent of the federal government and is no more subject to being enjoined on equal protection grounds than the federal civil servants who drafted the regulations. * * * If the state does exactly what the statute expects it to do, and the statute is conceded for purposes of the litigation to be constitutional, we do not see how the state can be thought to have violated the Constitution.

Id. at 423.

Similarly, in *Tennessee Asphalt Co.* v. *Farris*, 942 F.2d 969 (6th Cir. 1991), the plaintiffs challenged Tennessee's implementation of the STAA program, but conceded the facial validity of the federal statute and regulations. 942 F.2d at 972. Plaintiffs argued that Tennessee

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9098 (argued together Mar. 2, 1992). The district court in those cases rejected arguments similar to those made by petitioner here. *Harrison & Burrowes Bridge Constructors, Inc.* v. *Cuomo*, No. 89-CV-447 (N.D.N.Y. Oct. 1, 1991), and *United Fence & Guard Rail Corp.* v. *Cuomo*, No. 88-CV-306 (N.D.N.Y. Oct. 1, 1991).

violated the Equal Protection Clause by adhering to the ten-percent set-aside prescribed in the statute in the absence of any evidence of past discrimination in the State. *Ibid.* Citing *Milwaukee Pavers*, the Sixth Circuit rejected this argument, stating:

> [W]hile it is true that Tennessee may opt not to participate in the federal program at all, if the state decides to accept highway funds, it must meet the 10% DBE requirement, or fulfill the federal requirements for a variance by showing 10% participation is not possible despite good faith efforts. In other words, * * * Tennessee has no discretion to *either* accept the 10% DBE requirement *or* apply for a variance. Rather, it may only apply for a variance by establishing under federal standards that it cannot comply with the 10% requirement. Thus, every aspect of participation in the federal highway program is mandated by Congress.

Id. at 975.

The decision below is entirely consistent with *Tennessee Asphalt* and *Milwaukee Pavers*. Moreover, it does not conflict with this Court's holding in *Croson*. *Croson* involved the constitutionality of a 30% minority set-aside program enacted by the City of Richmond to remedy discrimination in the local construction industry. Applying strict scrutiny, the Court invalidated the city's set-aside program, ruling that it was not justified by a compelling state interest because the city had failed to identify sufficient evidence of past discrimination. 488 U.S. at 498-506. In addition, the Court held that the 30% set-aside was not narrowly tailored to achieve the stated remedial purpose because it was "not linked to identified discrimination in any way." *Id.* at 507.

The set-aside program invalidated in *Croson* was the result of a purely local initiative, and accordingly that

case provided no opportunity to address the question of the standards applicable to a State's implementation of a federally mandated racial classification in a federally assisted program. That question therefore remains an open one after *Croson*. Given the absence of any circuit conflict on that question, no further review is warranted.[6]

2. Petitioner challenges Utah's failure to seek a waiver of the annual ten-percent DBE goal (Pet. 7-12), asserting that the district court's interpretation of the waiver provision rendered it "of no force and effect." Pet. 11. What petitioner ignores, however, is the fact that Utah could not have qualified for a waiver, because the DOT regulations permit a State to select a goal of less than ten percent only if the State can demonstrate that the ten-percent level is not reasonably attainable. 49 C.F.R. 23.66(b); 23 C.F.R. Pt. 23, Subpt. D, App. D; 48 Fed. Reg. 33,443, 33,452 (1983). It is undisputed that Utah has been able to attain ten-percent DBE participation in its highway contracts, and thus it would have been futile for the State to apply for a waiver. Pet. App. 34.

In essence, petitioner's real quarrel is with the waiver procedure itself, not with the State of Utah's decision

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[6] Petitioner also asserts that the States may not "implement race-based programs by piggy-backing on the findings made by Congress." Pet. 15 (citing *Croson*, 488 U.S. at 504). Petitioner's reliance on this aspect of *Croson* is misplaced. The Court in *Croson* rejected the proposition that a state or local government could implement its own set-aside program in reliance on congressional findings (see 488 U.S. at 504), but nothing in the Court's opinion indicates whether the same rule would apply to a State that chooses to implement a federally mandated DBE program based upon the type of congressional findings found sufficient in *Fullilove*. *Croson* simply does not address the validity of a State's implementation of a federally mandated racial set-aside program, and thus it is not controlling in this context.

not to seek a waiver pursuant to that procedure. But by stipulating that the DOT regulations establishing the waiver procedure are facially valid, and by directing his challenge solely against the State's implementation of the federal program, petitioner has eschewed any opportunity to challenge the validity of the waiver procedure in this Court. Cf. *Milwaukee Pavers*, 922 F.2d at 425. Accordingly, petitioner's challenge to the State's failure to seek a waiver is without merit, and does not warrant review.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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SEPTEMBER 1992